



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

[Docket No.: IHS-FRDOC-0001]

42 CFR Part 136

RIN 0917-AA24

Removal of Outdated Regulations

AGENCY: Indian Health Service, Department of Health and Human Services.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Indian Health Service (IHS) of the Department of Health and Human Services (HHS or “the Department”) is issuing this Notice of Proposed Rulemaking (NPRM) proposing the removal of regulations appearing in the Code of Federal Regulations (CFR). These outdated regulations do not align with the current statutory text.

DATES: Comments due on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments to this proposed rule, identified by RIN 0917-AA24 by any of the following methods:

- *Federal eRulemaking Portal.* You may submit electronic comments at <https://www.regulations.gov> by searching for the Docket ID number IHS-FRDOC-0001. Follow the instructions <https://www.regulations.gov> online for submitting comments through this method.

- *Regular, Express, or Overnight Mail:* You may mail comments to Indian Health Service, Joshua Marshall, Senior Advisor to the Director, Indian Health Service, 5600 Fishers Lane, Rockville, MD 20857, email: joshuah.marshall@ihs.gov.

All comments received by the methods and due date specified above will be posted without change to content to <https://www.regulations.gov>, including any personal information provided about the commenter, and such posting may occur before or after

the closing of the comment period. Comments that make threats to individuals or institutions or suggest that the individual will take harmful actions will not be posted.

Docket: For complete access to background documents, posted comments, and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023, go to <https://www.regulations.gov> and search for Docket ID number IHS-FRDOC-0001.

FOR FURTHER INFORMATION CONTACT: Joshua Marshall, Senior Advisor to the Director, Indian Health Service, 5600 Fishers Lane, Rockville, MD 20857, email: joshuah.marshall@ihs.gov, phone: 301-443-7252.

SUPPLEMENTARY INFORMATION:

Background:

On January 27, 1982, IHS published regulations imposing restrictions on use of Federal funding for certain abortions, currently codified at 42 CFR 136.51-.57.¹ These regulations implementing IHS program authority pursuant to 25 U.S.C. 13 and 42 U.S.C. 2001 allowed the use of IHS funds for abortions only when a physician certified that “the life of the mother would be endangered if the fetus were carried to term.” This restriction was to be consistent with a provision in the annual appropriations legislation for the Departments of Labor, Health and Human Services, and Education, sometimes referred to as the “Hyde Amendment,” that restricted the use of Federal funds for certain abortions, which did not automatically apply to IHS funding.² The purpose of these IHS regulations was specifically “to conform IHS practice to that of the rest of the Department [of Health and Human Services] in accordance with the applicable congressional guidelines.”³ In 1988, Congress enacted 25 U.S.C. 1676, explicitly extending any limitations on the use

¹ Final Rule, *Provision of Abortion Services by the Indian Health Service*, 47 FR 4016 (Jan. 27, 1982).

² Continuing Appropriations for FY 1981, Pub. L. No. 96-369 (1980); Continuing Appropriations Act for FY 1982, Pub. L. No. 97-92 (1981).

³ Final Rule, *Provision of Abortion Services by the Indian Health Service*, 47 FR 4016 (Jan. 27, 1982).

of funds included in HHS appropriations laws with respect to the performance of abortions to apply to funds appropriated to IHS. As such, IHS became subject to the Hyde Amendment as included in annual appropriations legislation.

Since the IHS promulgated these regulations in 1982, Congress has repeatedly revised annual restrictions related to the use of Federal funds for certain abortions. In fiscal year 1994, for instance, Congress revised the Hyde Amendment to include additional exceptions to the general prohibition on the use of Federal funds for abortions, including in instances in which a pregnancy is the result of an act of rape or incest.⁴ Similarly, in fiscal year 1998, Congress also altered the standards for when the “life of the mother” may be considered an exception.⁵ The Hyde Amendment currently provides that no covered funds “shall be expended for any abortion” or “for health benefits coverage that includes coverage of abortion,” except “if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.”⁶

The current IHS regulation does not align with the current text of the Hyde Amendment or with 25 U.S.C. 1676. The IHS has complied with, and will continue to comply with, the statutory exceptions and has clarified its compliance with the statutory limitations through policy directives,⁷ and now seeks to remove these outdated

⁴ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 509, 107 Stat. 1082, 1113 (1993).

⁵ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, 509(b), 111 Stat. 1467, 1516 (1997).

⁶ Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2023, Pub. L. No. 117-328, 506-507, 136 Stat. 4459, 4908 (2022); Continuing Appropriations Act, 2024 and Other Extensions Act, Pub. L. No. 118-15 (2023).

⁷ Indian Health Service Circular No. 22-15, Use of Indian Health Service Funds for Abortions (Jun. 30, 2022), <https://www.ihs.gov/ihm/circulars/2022/use-of-indian-health-service-funds-for-abortions/>.

regulations in their entirety.⁸ Doing so will eliminate any potential confusion regarding the legal effect of these outdated regulations and will also achieve the goal of aligning IHS guidelines with the applicable Congressional guidelines governing HHS. These regulations are no longer necessary to achieve that objective, given Congress's enactment of 25 U.S.C. 1676, which independently aligns relevant restrictions applicable to the IHS and HHS. At this time, the IHS is not proposing any further changes to these regulations and is not proposing to amend the regulations to reflect the standard set out in the current Hyde Amendment. Regulations on this subject are not necessary to implement the IHS's authority. Nor are they necessary to comply with statutory directives. Moreover, amending the regulations to reflect the current Hyde Amendment could cause additional confusion in the future if Congress changes the annual appropriations language, as it has in the past.

Executive Orders 12866, 13563, and 14094

Executive Order 12866, as amended by Executive Order 14094, and Executive Order 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal Governments or communities; (2) create a serious inconsistency or otherwise interfere with an action

⁸ The regulations also speak to recordkeeping requirements and confidentiality of information. However, these provisions are unnecessary to maintain, because recordkeeping and confidentiality of information are independently required by other laws and regulations that will remain in effect. See, e.g., 45 CFR Parts 160, 164 (Standards for Privacy of Individually Identifiable Health Information (The Privacy Rule)).

taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. OIRA has determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866 Section 3(f).

Regulatory Flexibility Act

This action will not have a significant economic impact on Indian health programs. Therefore, the regulatory flexibility analysis provided for under the Regulatory Flexibility Act is not required.

Executive Order 13132 (Federalism)

Executive Order 13132, "Federalism," establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has federalism implications. This proposed rule would simply remove the existing, outdated regulations. HHS has determined that this proposed rule would not impose such costs or have any federalism implications.

Executive Order 13175

This rule does not have a substantial direct effect on one or more Indian Tribes under Executive Order 13175, because it only removes outdated regulations that do not align with the current statutory text of the Hyde Amendment or with 25 U.S.C. 1676.

National Environmental Policy Act

HHS had determined that this proposed rule would not have a significant impact on the environment.

Paperwork Reduction Act

This action does not affect any information collections.

List of Subjects in 42 CFR Part 136

Employment, Government procurement, Health care, Health facilities, Indians, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 42 CFR part 136 by removing Subpart F as follows:

PART 136 – INDIAN HEALTH

1. The authority citation for part 136 continues to read as follows:

Authority: 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C., 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

SUBPART F – [REMOVED AND RESERVED]

2. Remove and reserve Subpart F, consisting of §§ 136.51 through 136.57.

Dated: December 28, 2023.

Xavier Becerra,

Secretary,

Department of Health and Human Services.

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